UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

In re
MICHAEL L. FOUQUIER
MARGARET G. FOUQUIER
DEBTORS

BANKRUPTCY NO.
03-19159

SECTION "B"

CHAPTER 7

MEMORANDUM OPINION

This matter came before the court on April 21-22, 2004 on the motion of the United States Trustee to dismiss case under § 707(b) against the debtors, Michael L. Fouquier and Margaret G. Fouquier. For the following reasons, the court denies the motion.

I. FINDINGS OF FACT

1. Mr. Fouquier is employed as an inside sales representative for a pipe and supply company, from which he earns a gross salary of $2,749.30 per month. Mrs. Fouquier works as a high school teacher, and earns a gross salary of $2,204 per month. The statement of income and expenses shows that the debtors have a total combined monthly gross income of $4,953. After payroll deductions for taxes in the amount of $920 and health insurance in the amount of $152, their combined net monthly income totals $3,880.47.

2. The debtors have three children – a 22 year-old son who is not now but was a dependent up to one year ago, and two dependent daughters, ages 16 and 22. Their younger daughter attends high school and lives with her parents. Their older daughter is a full-time student at Louisiana State University, where she receives a full tuition award through the Louisiana Tops Scholarship Program.

3. The debtors own a one bedroom house in Metairie, Louisiana, which they purchased in 1986. The home is valued at approximately $160,000, and is encumbered by two mortgages. The balance on the first mortgage is approximately $74,100, and the balance on the second mortgage is approximately $49,800. The debtors also own two 2002 Mazda vehicles and a 1990 truck.[1] They have reaffirmed the debts on their home and cars.

4. According to the schedule of monthly expenditures, the debtors' monthly expenses total $2877.19.[2] They make monthly payments of $749 toward their first mortgage, property taxes, and insurance. They also pay $497.97 per month on the second mortgage. The schedules also show that the debtors spend $400 per month for automobile insurance and $464.16 per month for the car notes. They spend $160 per month on gasoline, a portion of which is attributable to their daughter in Baton Rouge. Mrs. Fouquier pays $58 per month for an additional health

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[1] The debtors testified that the two Mazdas were the cheaper models. The 1990 truck, bought for $1500 about two years ago, has over 100,000 miles on it and was bought from Mr. Fouquier's employer, who previously provided the truck for Mr. Fouquier's use.

[2] *See* Schedule J.

insurance policy. The debtors belong to a country club to which they pay $45 monthly dues. The remainder of the debtors' expenses is modest.

5. Although it is not included in the schedules, the debtors also pay their 22 year-old daughter's college room, board, and school supply expenses, which run $400-500 per month. The debtors also pay approximately $500 per month for their 16 year-old daughter's private school tuition.[3]

6. According to their schedules, the debtors have $495.31 per month remaining after expenses.[4]

7. According to their bankruptcy schedules, the debtors have unsecured credit card debt in the amount of $96,828.58. As of the date they filed for bankruptcy, the total minimum monthly payments required to service the credit card debt was approximately $2,754. The debtors had never missed or defaulted on a payment, and no creditor had brought any legal action against them. In order to meet the minimum payments required on some credit cards, the debtor took cash advances on other cards. They never used a cash advance for any other purpose.

8. In the year preceding their bankruptcy filing, the debtors made $19,915 in payments toward their credit card bills, incurred finance charges totaling $12,670, and made new purchases totaling $23,670.[5] According to the debtors' credit card

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[3] Mrs. Fouquier testified that this amount is deducted from her paycheck automatically and was not listed on the bankruptcy schedules.
[4] See Schedule "I" and amended Schedule "J."
[5] D. Ex. 1.

statements, during the ninety days prior to filing, the statements show the debtors made approximately $5,047 in purchases, incurred finance charges of $4,547, and made payments totaling $6,964.

9. The debtors made good faith efforts to handle this crushing credit card debt short of filing for bankruptcy relief. The debtors had refinanced their home twice in the past and when Mr. Fouquier realized in September 2003 the extent of the credit card debt, he tried again to refinance their home with both the first and second mortgagees. Both refused because the debt to income ratio of the debtors was too high. Mr. Fouquier also contacted a credit counseling company who suggested that all of the debt could be worked out if the debtors could (1) get the interest rate (24.99% on some of the credit cards) reduced and (2) pay $1500 per month over a five year period. Mr. Fouquier also checked on the computer with another company but its suggested out of court debt adjustment was also not feasible because the debtors could not make a $1500 per month payment.

10. Mr. Fouquier talked to his CPA about cashing in his retirement plan but the CPA advised him not to do it because he would have received only $40,000 or less for cashing in early the $90,000 fund. This CPA advised Mr. Fouquier to file for bankruptcy relief and recommended the attorney who filed the petition for the debtors.

11. In October 2003, about six weeks before they filed for bankruptcy, the debtors liquidated Mrs. Fouquier's 401K pension plan, which was worth $12,300 at the time,[6] in order to pay debts and living expenses. As a result of penalties and deductions, the debtors received only $8,000 from cashing in early Mrs. Fouquier's 401(k) plan.

12. On November 25, 2003, the debtors filed for Chapter 7 bankruptcy relief. After filing for bankruptcy, the debtors borrowed money against Mr. Fouquier's 401K plan in order to pay taxes for the early termination of Mrs. Fouquier's plan. They are currently repaying this loan at a rate of $250 per month.[7]

II. CONCLUSIONS OF LAW

Bankruptcy Code § 707(b) provides:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.[8]

Under the clear wording of § 707(b), there is a presumption in favor of granting the debtor a discharge.[9] The presumption is an "indication that in

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[6] See Statement of Financial Affairs, "Closed financial accounts".
[7] This $250 per month payment is not reflected in the schedules because the borrowing was post-petition.
[8] 11 U.S.C. § 707(b).
[9] *Id.*

deciding the issue, the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present."[10] The moving party, in this case the U.S. Trustee, bears the burden of proving substantial abuse.[11]

The Bankruptcy Code does not define "substantial abuse," and neither the Supreme Court nor the Fifth Circuit Court of Appeals has provided a definition.[12] Two lines of jurisprudence have emerged for determining substantial abuse.

Many courts apply a totality of the circumstances test to determine whether a debtor has committed substantial abuse warranting dismissal.[13] These courts have discussed the following criteria:

(1) Whether the debtor has a likelihood of sufficient future income to fund a chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims;

(2) Whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity;

(3) Whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his/her ability to repay them;

(4) Whether the debtor's proposed family budget is excessive or extravagant;

(5) Whether the debtor's statement of income and expenses is misrepresentative of the debtor's financial condition;

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[10] *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988).
[11] *See* 6 Collier's on Bankruptcy ¶ 707.04[5][a], at p. 707-27.
[12] *In re Fergason*, 295 B.R. 96, 98 (Bankr. S.D. Tex. 2003); *In re Faulhaber*, 243 B.R. 281, 284 (Bankr. E.D. Tex. 1999); *In re Rubio*, 249 B.R. 689, 694 (Bankr. N.D. Tex. 2000); *In re Higuera*, 199 B.R. 196, 198 (Bankr. W.D. Okla. 1996).
[13] *In re Green*, 934 F.2d 568 (4th Cir. 1991); In *re Fergason*, 295 B.R. 96 (Bankr. S.D. Tex. 2003); *In re Faulhaber*, 243 B.R. 281, 284 (Bankr. E.D. Tex. 1999); *In re Rubio*, 249 B.R. 689, 696 (Bankr. N.D. Tex. 2000); *In re* Stewart, 175 F.3d 796 (10th Cir. 1999); In *re Lampkin*, 221 B.R. 390, 392 (Bankr. W.D. Tex. 1997); *In re Laman*, 221 B.R. 379, 381 (Bankr. N.D. Tex. 1998); *In re Heasley*, 217 B.R. 82, 87 (Bankr. N.D. Tex. 1998); *In re Watkins*, 216 B.R. 394 (Bankr. W.D. Tex. 1997).

(6) Whether the debtor has engaged in eve-of-bankruptcy purchases; and

(7) Whether the petition was filed in good faith.[14]

Under the second line of cases, courts hold that "substantial abuse may exist wherever the debtor has the ability to pay a significant portion of his or her debts without undue hardship."[15]

In application, these two lines of authority are not considerably different. Generally, courts have adopted a totality of circumstances test in which they consider the debtor's ability to pay as one of many factors constituting substantial abuse.[16] The persuasive weight to which they assign that factor varies among courts, however, as do the other circumstances considered.[17]

In this case, the court finds that the totality of circumstances test is the appropriate standard by which to determine substantial abuse. Applying the above factors, the court finds that the U.S. Trustee has failed to carry the burden of proof sufficient to support a finding of substantial abuse warranting a dismissal.

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[14] *Fergason*, 295 B.R. at 98, *quoting Norton Bankr.Law & Practice 2d.*, § 67:5, at 67-10 (1997).
[15] *Id., citing In re Kelly*, 841 F.2d 908 ((th Cir. 1988); *U.S. Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992).
[16] *Fergason*, 295 B.R. at 99. *See In re Kornfield*, 164 F.3d 778, 783-783 (2d. Cir. 1999)(affirming dismissal on substantial abuse grounds based on ability to pay followed by analysis of the totality of circumstances to determine the presence of aggravating or mitigating factors); *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 809 (10th Cir. 1999)(ability to pay primary factor but other mitigating "unique hardship" and aggravating factors must be considered); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989)(focusing on debtor's honesty and neediness in applying the totality of circumstances test); *In re Lamanna*, 153 F.3d 1, 2 (1st Cir. 1998)(adopting totality of the circumstances test set forth in *Krohn* and noting that ability to pay is primary but not conclusive factor of substantial abuse); *In re Green*, 934 F.2d 568, 572 (4th Cir. 1991)(refusing to adopt a per se rule that ability to pay constitutes substantial abuse but considering ability to pay within its totality of the circumstances analysis).
[17] *Id.*

First, and most significantly, the court finds that the U.S. Trustee has failed to present evidence of any likelihood that the Fouquiers will earn sufficient future income to be able to pay back a substantial portion of their unsecured claims. Although the schedules showed that the debtors have around $1000 per month in disposable income, the testimony at trial clearly shows this is not the case. They pay an additional $400 to $500 per month for the expenses of their 22 year-old daughter, who is a full-time college student. This expense alone cuts their disposable income in half. In addition, the high school tuition for the debtors' 16 year-old daughter is automatically deducted from Mrs. Fouquier's paycheck, and upon the daughter's graduation in May 2005, it will cost another $400 to $500 per month for her college expenses (assuming she earns a tuition scholarship like her sister). Also, the debtors are paying $250 per month to pay off the money borrowed against Mr. Fouquier's 401(k) to pay the additional taxes because of the early liquidation of Mrs. Fouquier's 401(k).

Also, the court accepts the testimony of the debtors that the estimate of expenses by the debtors in their schedules is too low because their actual monthly bill for food is $400 per months rather than the $300 figure and the transportation expense estimate of $160 per month will be higher because of the increased cost of gasoline since the schedules were filed. It is clear that there is no reasonable

likelihood of sufficient future income for the debtors to pay any substantial portion of the unsecured debt.

Even assuming, as the U.S. Trustee argues, that the debtors do have $500 per month in disposable income, or $6000 per year, that amount relative to the almost $98,000 in debt is insufficient to pay a substantial amount toward their unsecured creditors. It is undisputed that the debtors have incurred debts far in excess of their ability to pay. But the U.S. Trustee has not presented any evidence to suggest there is any end in sight to the gloomy financial state of the debtors.

Second, the parties do not dispute that the debtors were not in the midst of any illness, calamity, disability or unemployment at the time of their bankruptcy filing. The court notes that it was very impressed by the candor of both debtors as witnesses, who did not attempt to avoid any questions or be argumentative with the U.S. Trustee. The debtors were frank about the fact that their debt spiraled out of control because of their own financial irresponsibility.

Third, no evidence indicates that their debt consisted of large consumer items or large or frequent cash advancements. The debtors' credit card statements show that the debtors accrued unsecured consumer debt over a long period of time – five years – from many small purchases. Although the court does not condone the debtors' acts of accruing more debt by taking out cash advancements to make payments toward already outstanding debt, the court recognizes that the debtors

only juggled their debt in this manner a few times, and that their intent to reduce debt was ironically responsible for increases in credit card debt.

Fourth, the court finds insufficient evidence exists to conclude that the debtors' proposed family budget is excessive or unreasonable. No evidence indicates that the debtors used their credit cards to make excessive or extravagant purchases. In making determinations of substantial abuse, courts are concerned with luxury purchases such as cars and expensive electronics, not the undergarments and acne medication that the U.S. Trustee holds up in this case as being extravagant. The court is satisfied by Mrs. Fouquier's explanation of her and her daughter's needs for these items, and the relatively modest amounts spent on them.

Fifth, the court finds that the debtors' schedules contained an adequately accurate portrayal of their financial status at the time of their filing. The U.S. Trustee finds fault with the accuracy of the debtors' initial schedules and statement of financial affairs, pointing to their failure to list the extra monthly expenses they incur to support their college-age daughter. The court finds that this small error is trivial and unimportant, however.

Sixth, the testimony and evidence show no luxury expenses or cash advancements on the eve of bankruptcy. The debtors' testimony that they borrowed on some of the credit cards to pay the minimum payment required on

other credit cards is uncontested. Again, the debtors' credit card statements show that their huge balances were accrued over a long period, and from many small purchases. The court finds that rather than running up a large amount of credit card debt over a short period of time and then rushing to bankruptcy court to discharge that debt, the debtors incurred the large balances on their credit cards over a long period of time and tried several ways to work out this debt short of bankruptcy.[18]

Seventh, the court finds that no evidence of bad faith exists as to the debtors' filing in any way. The court was impressed by the debtors' effort to deal with their debts, their tearing up their credit cards when the husband realized the enormity of the debt, and the lack of likelihood of increased future income. Considering the totality of the circumstances, the court feels that these debtors are entitled to the fresh start offered by Chapter 7.

[18] *See Rubio*, 249 B.R. at 698-99 (refusing to determine bad faith on the part of the debtor based on evidence of a long history of living beyond her means); In *re Drillman*, 2004 Bankr. LEXIS 369, *30 (Bankr. D.N.Y., April 2, 2004)(considering the fact that the Debtor accumulated his debt over time rather than incurring cash advances far in excess of his ability to pay).

III. CONCLUSION

For the foregoing reasons, the court finds that insufficient evidence exists to support a finding of substantial abuse warranting a dismissal under § 707(b). Judgment will be entered in accordance with this opinion.

New Orleans, Louisiana, July 1, 2004.

J. A. Brown

JERRY A. BROWN
UNITED STATES BANKRUPTCY JUDGE